solute liability where an injury arises as the proximate result of the employment. In other words, these cases hold that contributory negligence is not a defense to an action for personal injuries brought by a child employed under the statutory age.

F. S. T., JR.

LIABILITY OF A MUNICIPAL CORPORATION IN TORT FOR THE ACTS OF ITS AGENTS, IN THE EXERCISE OF A GOVERNMENTAL FUNCTION. —In determining whether or not a municipal corporation is liable for the torts of its agents, the courts have endeavored to divide all of the functions of the municipality into two great classes: first, municipal, proprietary, or ministerial; and second, governmental.[1] Carrying the classification still further, it has been suggested that the activities of a city, by their very nature, group themselves into three divisions: commercial, municipal, and governmental;[2] but no cases making this distinction have been found. The early Common Law apparently made no discrimination between the various capacities of the municipal corporation, due to the fact that the towns were not originally incorporated, and, therefore, not subject to suit.[3] The varied duties were performed by the crown, and on later being delegated to the counties, cities and towns, the same immunity from suit existed, on the ground that "the king can do no wrong".[4] Doubtless the generally prevailing tendency of the past to relieve the municipal corporation from responsibility has been brought about by this early custom and situation. But in recent years the cities have undertaken duties not necessarily incident to the usual powers of municipal corporations, and the former rule of total exemption from liability cannot be strictly applied.

The courts have come to the conclusion that there are certain phases of municipal activity for which the city must be responsible; and as to any torts committed in such operations by the agents of the city, the rule of *respondeat superior* applies. Such duties have been variously styled proprietary, municipal, or ministerial, and relate to corporate interests only.[5] Many different corporate operations have been classed under this head, and al-

[1] Johnson *v.* City of Chicago, 258 Ill. 499, 101 N. E. 960; Barrie *v.* City of Cape Giradeau (Mo.), 95 S. W. 330; Maxmilian *v.* Mayor, 62 N. Y. 160.

[2] 25 HARV. LAW REV. 605.

[3] Cunningham *v.* City of Seattle, 42 Wash. 134.

[4] Russel *v.* Men of Devon, 2 T. R. 359.

[5] "Municipal corporations may have the aspect where their functions are chiefly ministerial, and relate to corporate interest only. These include the making of public improvements, the repairs of such improvements, and the holding of corporate property for municipal purposes. The officers of the municipality in exercising this class of powers are to be regarded as agents of the lesser public, and the maxim of *respondeat superior* applies." Conrad *v.* Trustees, 16 N. Y. 158; Maxmilian *v.* Mayor, *supra;* 4 DILLON, MUNICIPAL CORPORATIONS, 5th ed. § 1647.

most invariably the municipality has been held up to a liability. It is not the purpose of this note to discuss further the generally accepted doctrine on this point, other than to cite certain decisions in which duties undertaken by the city were put in this classification. Thus it is held that a city is liable for the condition of its streets and injuries resulting therefrom;[6] likewise when it undertakes to build and maintain a municipal lighting plant;[7] or to furnish a water supply as a corporate business;[8] or in the building of a cistern by the city for the use of its fire department.[9] In all of these cases, and in the many more on the subject, the advantages gained by the assumption of these activities by the municipality have accrued to the inhabitants of the city and its environs.

As to strictly governmental functions, however, the decided weight of authority has settled that the municipal corporation should be free from liability.[10] Thus it has been held that the city is not liable for the torts of its agents when the act was committed by a member of the municipal fire department;[11] or by its police force [12]—these two duties in particular having been classed almost invariably as purely governmental functions. Likewise, the governmental capacity has been extended still further to include sanitary protection;[13] the building of bridges, and their maintenance;[14] the operation of municipal ambulances;[15] and many other illustrations of the type, most of such cases holding that the city was not liable. The distinction between the governmental and proprietary or municipal function, with its varied and different classes of liability, has been difficult to maintain,[16] as many of the duties claimed to be in one class could well be con-

[6] Detroit *v.* Blackely, 21 Mich. 84; 4 DILLON, MUNICIPAL CORPORATIONS, 5th ed., § 1691, and cases cited therein. But *contra* in New England in the absence of statute. Goddard *v.* Inhabitants, 84 Me. 499, 30 Am. St. Rep. 384.

[7] Aiken *v.* City of Columbus, 167 Ind. 191, 78 N. E. 657; Dickinson *v.* City of Boston, 188 Mass. 595, 75 N. E. 680.

[8] Negligence of driver of water department wagon. Lynch *v.* City of Springfield, 179 Mass. 430, 54 N. E. 871; Bailey *v.* Mayor of New York, 3 Hill 531; 4 DILLON, MUNICIPAL CORPORATIONS, 5th. ed., § 1631.

[9] Mulcairns *v.* City of Janesville, 67 Wis. 24, 31 N. W. 331.

[10] Burch *v.* Hardwick, 30 Grat. (Va.) 24; Hill *v.* City of Boston, 122 Mass. 344, 23 Am. Rep. 381; 4 DILLON, MUNICIPAL CORPORATIONS, 5th. ed., § 1642; LILE, NOTES ON MUNICIPAL CORPORATIONS, 67; note 30 Am. St. Rep. 398.

[11] Jewett *v.* City of New Haven, 38 Conn. 368; Fisher *v.* Boston, 104 Mass. 87; 4 DILLON, MUNICAPAL CORPORATIONS, 5th. ed., § 1660.

[12] Lamont *v.* Stavanaugh, 129 Minn. 321, 152 N. W. 720; Whitefield *v.* Paris, 84 Tex. 431, 19 S. W. 566; Carty *v.* Winoski, 78 Vt. 104, 62 Atl. 45.

[13] Howard *v.* Philadelphia, 250 Pa. 184, 95 Atl. 388; Wyatt *v* Rome, 105 Ga. 312, 31 S. E. 188.

[14] Daly *v.* New Haven, 69 Conn. 644, 38 Atl. 397.

[15] Maxmilian *v.* Mayor, *supra.*

[16] Fowler *v.* City of Cleveland (Ohio), 126 N. E. 72; 1 VA. LAW REV. 497.

sidered to be in the other; and the courts, in endeavoring to hold the municipality liable, have stretched the proprietary or municipal doctrine, so that it now includes many operations which were formerly classed as governmental.[17] Thus, the gradual change of the viewpoint of some of the courts is apparent, where, in the obvious design to hold the municipal corporation liable, they have endeavored to bring the function within the doctrine of *respondeat superior.*

One court has gone to the extent of holding that the municipality is liable for the negligent operation of a fire department apparatus, basing its decision on the ground that the exercise of fire protection is a ministerial function, for a tort in the performance of which the city should be liable.[18] Likewise, another court further demonstrated its desire to hold the city liable, by maintaining that the operation of a vehicle of the city by its employee engaged in transporting police to their beats in the outlying districts of the city, was a ministerial act, and that a tort committed in the course of such act rendered the municipality liable.[19] Yet all connection with the police protection has been formerly held purely governmental in its nature.[20] Another court made the city liable for the negligence of its fire department, on the ground of the duty of the city to keep the streets reasonably safe for street purposes,[21] and that the negligent operation of a vehicle of the fire department, thus endangering the public in the use of the street, was a violation of that duty and rendered the city liable.[22] It has been further held that it is no defense to an action for a breach of this duty, that the obstruction or danger was the result of the negligent performance of a governmental function.[23]

The weight of authority, however, has established as a doctrine of the law that the municipality should not be liable for the torts of its agents committed in the exercise of a function wholly governmental.[24] That the cases show this to be the fact is not to be doubted. But where the reason for the rule no longer exists, then the rule itself should change. It might not be impertinent here to recall to the profession the answer of the advocate of a

[17] See cases cited in notes 18, 19 and 21.
[18] Fowler *v.* City of Cleveland, *supra.*
[19] Jones *v.* Sioux City (Iowa), 170 N. W. 445.
[20] See cases cited in note 12.
[21] And a municipality is under a duty to keep its streets in a reasonably safe and convenient condition for ordinary travel. This is considered in most jurisdictions as a common law obligation. 4 DILLON, MUNICIPAL CORPORATIONS, 5th. ed., § 1691; LILE, NOTES ON MUNICIPAL CORPORATIONS, 55; Roanoke *v.* Shull, 97 Va. 419, 34 S. E. 34. But the "New England Doctrine" imposed no such liability on the municipality in the absence of statute. See note 6.
[22] There was a statute here imposing liability upon the municipality under certain circumstances. Creps *v.* City of Columbia, 104 S. C. 371, 89 S. E. 316.
[23] Savannah *v.* Jones (Ga.), 99 S. E. 294.
[24] See cases and authorities cited in note 10.

new doctrine, when, on being told by an antiquarian that his point was not the law, agreed with him, but had the temerity to state that it was going to be the law. The municipal corporation has developed from a mere infant with few powers and doubtful strength to the venerable and puissant city of today. Either expressly or impliedly, the municipality has been granted authority to undertake various activities formerly controlled only by private individuals or corporations. In those operations which are thus exercised solely for the benefit of the municipality, the city has been repeatedly held responsible for the acts of its agents, as shown above. The foundation for the freedom from liability in the governmental functions is mainly historical. The basic case upon the subject, and one frequently cited, is *Russell* v. *Men of Devon*,[25] where the action was brought against the inhabitants of the county for injuries resulting from a defective bridge. The court, in its opinion in that case, after refusing to allow a recovery, stated that "where an action is brought against a corporation for damages, those damages are not to be recovered against the corporators in their individual capacity, but out of their corporate estate: but if the county is to be considered as a corporation, there is no corporation fund out of which satisfaction is to be made." Thus, this case is authority only for the doctrine that the county should not be held to a liability; and in no way suggests a liability for the municipal corporation, but on the contrary, by a *dictum*, indicates that the city might be held liable.

The question appears to be one solely of agency and tort. By the general rules of agency, the maxim of *respondeat superior* applies where an agent, in the course of his employment, commits a tort.[26] Judge Dillon, in explaining the use of this maxim, says:[27]

> "In determining whether *respondeat superior* applies and makes the municipality liable for the acts of its servants or agents, the question is whether they are servants or agents of the corporation. If the corporation appoints or elects them; can control them in the discharge of their duties, and if those duties relate to the exercise of *corporate* powers, and for the peculiar benefits of the corporation in its local or special interest, they are to be considered as its agents or servants, and the maxim of *respondeat superior* applies. But if, on the other hand, they are elected by the corporation, in obedience to the statute; to perform public service, not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of the government, if they are independent of the corporation as to the tenure of their office and in the manner of discharging their duties, they are not to be regarded as the servants or

[25] 2 T. R. 359.
[26] Carter *v.* Mills Co., 58 N. H. 52.
[27] 4 DILLON, MUNICIPAL CORPORATIONS, 5th. ed., § 1655.

agents of the corporation, for whose acts or negligence it is impliedly liable, but as independent public or State officers with such powers and duties as the statute confers upon them, and the doctrine of *respondeat superior* is not applicable."

This statement appears to be very clear, but it is difficult to ascertain just how the usual type of agent of the governmental function can be included here. For example, the city usually has complete control of the fire department, and can govern the employment and use of its members at will. And it is easy to include the fire protection as an interest mainly local and corporate, and only incidently affecting the concern of the state at large. Yet it has been held frequently that the operation of the fire department is a governmental function.[28] The rule of *respondeat superior* is a creation of the common law, as also are the rules as to general liability for negligence.[29] There is no property or guaranteed right in these doctrines of law, and they may be added to or repealed by the legislature or altered by the decisions of the courts.[30] Where such a rule had its origin in the decisions of courts, it may be changed by the courts in the light of experience, unless it has become fixed by constitutional or legislative provision. The law is declared one way or the other. If the old law is found unsuited to present conditions or unsound, it should be set aside and a rule declared which is in harmony with those conditions and meets the demands of justice; in other words, the rule of *stare decisis* is not imperative.[31] As to the tort character of the question, the basic reasoning is apparent. If a wrong is done by a corporation, though the act is performed, as it necessarily must be, by one of its agents, then the party injured is entitled to recover damages.[32] Why, then, should the individual wronged be deprived of his recovery because the tort happened to be committed in the exercise of a governmental function?

Realizing the injustice to the individual of this arbitrary rule of non-liability in the exercise of the governmental function, the Supreme Court of Ohio has, in effect, repudiated the doctrine. In *Fowler* v. *City of Cleveland*[33] the court expressly overruled the case[34] which had established for that jurisdiction the principle of exemption from liability in the governmental function, at least as far as the torts of the members of the municipal fire department were concerned. The basis for the decision in the Fowler Case[35] was that the operation of the fire department apparatus was a ministerial act, for which the city should be held

[28] See cases cited in note 11.
[29] Fowler *v.* City of Cleveland, *supra.*
[30] Arizona Copper Co. *v.* Hamin, 250 U. S. 300.
[31] Colorado Seminary *v.* Board of Commissioners (Col.), 71 Pac. 410; Leavett *v.* Morrow, 6 Ohio St. 71, 67 Am. Dec. 334.
[32] COOLEY, TORTS, 207.
[33] 126 N. E. 72.
[34] Frederick *v.* City of Columbus, 58 Ohio St. 538, 51 N. E. 35.
[35] Fowler *v.* City of Cleveland, *supra.*

liable. The opinion of Mr. Justice Wanamaker in that case concurred with the result, but differed in the reasoning, as he abandoned the distinction between governmental and ministerial or municipal functions as the ground for determining the liability of the city. Though the reasoning of this case may not be agreed with, yet the tendency of at least one of the great courts to change the established doctrine is shown. Admiralty courts in this country have always held the municipality liable, despite the governmental nature of the function.[36] It is improper that of the courts in the same geographical jurisdiction, one should hold the municipality liable in tort for all types of municipal activities and duties, and another court restrict the liability only to certain and specified functions. Yet such is the case in this country, due to the divergence between the admiralty and the usual state court doctrine.

The basis for the doctrine of non-liability in the exercise of the governmental function does not appear to be either sound or logical. One reason frequently given for the rule is that the agents, performing the act for the municipality, are the agents of the State, and not of the municipality.[37] In consideration of this argument, it should be recalled that the agency principle is that the character of the services rendered does not determine the fact of agency, but such agency is to be determined by deciding whether or not the principle employs, pays, controls, and dismisses the servant.[38] Here the municipality chooses its agents; it is the sole judge of their efficiency; it has, or should have, knowledge of their delinquencies. The state has no means, other than through the municipality, of examining these agents; and if their tortious acts cause injury to an individual, the municipality alone should be responsible. Nor, again, can the exemption from liability in the governmental function be based upon the theory that the city derives no pecuniary benefit or profit from the exercise of the function.[39] The city never obtains revenue from the use of its streets, yet it has generally been held liable for the negligence of its agents and servants in keeping such streets in good condition.[40] It has been held that the fact that water works were constructed under legislative authority and indirectly managed by the legislature through a committee would not exempt the city from liability.[41] "It is true that the State does not engage

[36] Giovanni *v.* Philadelphia, 59 Fed. 303; Workman *v.* Mayor of New York, 179 U. S. 552; City of Chicago *v.* White Transportation Co., 243 Fed. 358.

[37] 4 DILLON, MUNICIPAL CORPORATIONS, 5th ed., § 1655; Maxmilian *v.* Mayor, *supra.*

[38] Martin *v.* Temperly, 4 Q. B. 298; Laugher *v.* Pointer, 5 B. & C. 547.

[39] Hill *v.* Boston, 122 Mass. 344.

[40] See cases cited in notes 6 and 21.

[41] Esberg-Gunst Cigar Co. *v.* City of Portland, 34 Ore. 282, 155 Pac. 961.

in the business itself of furnishing water, but the State does not sprinkle streets or highways, furnish free vaccination, nor in many states maintain any hospital."[42] These two arguments have formed the ground for the majority of the cases exempting the city from liability in the governmental function.

The real basis for the persistent holdings for this doctrine of non-liability is that the courts have been bound by a precedent brought down from history. The need for such a rule no longer exists; the cities are on a firm basis, and are charged with such tremendous powers and are engaged in so many activities which form a menace to the rights of the individual, and, under certain circumstances, deprive him of his safety of property and person. The vast number of employees of the average large city of today greatly increase the risk to the individual, and if such person should happen to suffer loss through the torts of such employees, there would be no recovery under certain circumstances. The governmental functions of the city would be performed in a manner better tending to safety to the individual, if the municipality recognized the law as being that it would be liable for the negligence of its agents; a more responsible type of employee would be engaged, and thus the rights of the public would be to some extent protected. It should be a part of the public policy of the community that the party wronged should have a right of action. Then the question would naturally be: against whom? The answer should be that the action would lie against the principal who made the wrong possible. This should be a part of the protection furnished, in return for taxes and other obligations, by the municipality, to its citizens and to those not its citizens who dwell within its limits. R. B.

CONSTRUCTION OF THE TERM "WITHIN THE COURSE OF THE EMPLOYMENT" UNDER THE WORKMEN'S COMPENSATION ACT.—Most frequently, in cases of the representatives of a deceased employee seeking to show liabiltiy on the part of the employer under the Workmen's Compensation Acts, the case turns on the issue whether or not the accident which caused the death of the employee arose out of and in the course of his employment. Precisely what is to be understood by the phrase "out of and in the course of his employment" is, to say the least, difficult; especially when we attempt to apply this to a given set of facts as a test of liability. It has been said that these acts should be broadly interpreted in accordance with their primary purpose of providing support for those dependent upon a deceased employee.[1]

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[42] "Nature of Governmental Functions", 1 VA. LAW REV. 503.

[1] Coakley *v.* Coakley, 216 Mass. 71, 102 N. E. 930; In re Hurle, 217 Mass. 223, 104 N. E. 336.